SUBJECT INDEX

	Page
Statement	1
What the Sixth Circuit Judges Held Regarding This Patent	7
Claim 3 of the Patent and the C. C. A. of the Fifth Circuit	10
The Thompson Patent 1,072,791	14
Mr. Justice Clarke on Thompson Patent	16
Court of Appeals Sixth Circuit on Thompson Patent	17
Temco v. Pennsylvania Rubber Co., by Judge Westenhaver	18
The I. J. Cooper Rubber Co. Case	19
Tennessee Mill & Supply Co. Case	19
The Belknap Hardware Co.	20
Validity and Infringement Questions Stare Decisis	20
Respondent's Absorber	22
Infringement	24, 28
Former Commissioner of Patents Newton on Infringement	24
Justice Clarke on Infringement	30
Sixth C. C. A. on Intringement	30
Judge Westenhaver on Infringement	32
Certiorari	35
Radius Link	35
Patentee Storrie's Admissions	36

PAGE
Craig's Testimony 39
Georgia District Court's Injunction Opinion..... 40
Justice Clarke on Prior Art 41
Court of Appeals on Prior Art 42
Judge Westenhaver on Prior Art 42
Bussing English Patent Now Cited Same as Bussing French Patent Formerly Cited 43
Peugeot French Patent 44
Lefevre Patent 44
Rimailho Patent 44
Cosset French Patent 44
Edwards Absorber 45
Question of Estoppel of Respondent as Licensee Under K-W Ignition Co. 46
Summary Commercial Career Thompson Absorber 48

CUTS

K. W. Absorber 6
Apco Absorber 6, 22, 25
Halladay ..... Opposite 36
K. W. ..... Opposite 36
Temco ..... Opposite 36
Forest City ..... Opposite 36
Original Thompson with Link ..... Opposite 36
Apco ..... Opposite 36

CASE INDEX

PAGE

Adt v. Kerstein, *259* F. *277* 22

Apco v. Temco, 11 F. (2nd) 109 ..... 1, 10, 34

Bacon, Great Place 21

Beach v. Hobbs, 92 F. 147 22

Cincinnati Butchers' Supply Co. v. Walker, *230* F. 433 22

Concrete Appliances v. Gomery, *284* F. 518 22

Flat Slabs Patent Co. v. Wright, *283* F. 345 22

General Electric v. Hoskins, *224* F. 464 45

Gordon v. Torco-Halvah, *247* F. 487 50

Gormley & Jeffrey v. U. S. Agency, *177* F. *962* 22

Groton v. Clark, *136* F. *27* 18

Hamfen v. Godshalk, *84* F. *649* 45

Herman v. Youngstown, 191 F. 579 50

Hobbs v. Beach, 180 U. S. *389* 21

Howell, Letters, L. vi., 11 21

Jay v. Sparks-Withington, *258* F. 45 22

Klink v. Chicago, *219* F. 457 18

K-W Ignition Co. v. Temco, *260* U. S. *746* 35

Meurer Steel Co. v. Draper, *260* F. 410 22

Reed v. Hughes, *261* F. 192 ..... 35, 36

Rogers v. Menhall, 13 F. 59 18

Selectasine v. Prest-O-Graph, *267* F. 840 45

Shakespeare's King John, v., *2, 3* 21

Simplex v. Hauser, *248* F. 919 50

Temco v. Apco, 11 F. (2nd) 109 ..... 1, 10, 34

Temco v. Belknap Hardware Co. 4, 25 *29*

Temco v. Cooper Rubber Co. 3, 19, 25, *29*

Temco v. Forest City 3, 7, 9, 11, 32, 42

Temco v. Halladay, Plaintiff's Exhibits *28* and *29* ..3, 7

Temco v. K. W. (Judge Clarke) 16, 30, 41

PAGE

Temco v. K-W Ignition Co., 243 F. 588
1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 17, 18, 23, 28, 30, 31, 42

Temco v. K-W Ignition Co., 283 F. 873
2, 31, 34, 37, 49

Temco v. Pennsylvania Rubber Co., Plaintiff's Exhibit 3 ..... 3, 5, 18, 19, 23, 24, 25, 28, 29

Temco v. Tennessee Mill & Supply Co. 4, 19

Vacuum Cleaner v. Thompson, 258 F. 239 22

Winans v. Denmead, 15 How. 330 41

United States Supreme Court

October Term, 1926
No. 325

The Temco Electric Motor Company,
Petitioner,

—v.—

Apco Manufacturing Company,
Respondent.

BRIEF FOR PETITIONER

To the Honorable The Supreme Court of the United States.

Statement of the Case.

First. This case is here pursuant to the order of this Court granting Petitioner's application for the Writ of Certiorari. (Granted April 26, 1926.) That petition was based on the ground of conflict between the opinions and judgments of the United States Circuit Court of Appeals for the Sixth Circuit (243 F. 588) and of several of the District Courts of that Circuit, embracing the judicial findings of some eight of the Judges, commencing with a former member of this Court, Mr. Justice Clarke, (Rec. 278), and the contrary judgment and opinion of one District Judge for the Northern District of Georgia and of the Court of Appeals for the Fifth Circuit. (11 F. (2nd) 109.)

Second. The exact diversity of opinion exists as to the validity of Claim 3 of Petitioner's United States Letters Patent No. 1,072,791, of September 9, 1913,

issued to Thompson & Thompson, for Improvements in Automobile Shock Absorbers, to the infringement of Claims 1, 2, 3 and 4 of said patent, and to the scope of Claims 1, 2 and 4 of the patent, as to which questions the Courts in the two Circuits differed on records that did not differ as to any matter affecting these questions—no new or different prior art was in the Fifth Circuit case over what was before the Court of Appeals in the Sixth Circuit.

Third. The points of conflict arose as follows: That Mr. Justice Clarke (when District Judge) and the Court of Appeals for the Sixth Circuit, Judges Warrington, Knappen, Denison, Donahue and Sater (some of them sitting in the Court of Appeals on the patent questions and some on the accounting), and Judges Killits and Westenhaver (sitting in the District Courts) held your Petitioner's said patent for such Shock Absorbers **(the first absorber ever devised for a Ford car)** to be good and valid as to all four of its claims; your Petitioner being later awarded a recovery of $292,938.26 by the Circuit Court of Appeals for the Sixth Circuit.

Fourth. These judgments were rendered by the District Court for the Northern District of Ohio, Eastern Division, Mr. Justice Clarke (then District Judge), and by the Court of Appeals for the Sixth Circuit, affirming him, in the case of this Petitioner versus The K-W Ignition Co. (243 Fed. 588, June 8, 1917, and 283 F. 873, 1922). **These Courts gave to the claims a scope sufficient to include shock absorbers having the same functional features and the same mode of operation as are embodied in Respondent's shock absorber involved herein.**

Fifth. Other District Courts of the Sixth Circuit, in cases involving similar structures, found this patent to be valid as to all of its claims, and to be infringed as to the entire four claims, to-wit: Judge Westen-

haver, in the United States District Court for the Northern District of Ohio, Eastern Division, July 18, 1919, in the case of this Petitioner v. Forest City Electric Company; and again by him in the Western Division, in the case of Petitioner v. Penn. Rubber & Supply Co., a jobber then dealing in the shock absorbers of this Respondent, now involved in this present suit. This trial was held in open court on issues joined on that defendant's answer setting up the prior art and denying validity of this patent, and its infringement, but counsel for that defendant did not appear until the accounting was commenced, which latter resulted in a money judgment for this Petitioner. **In its answer herein Respondent admits that the shock absorber involved in this Penn. Rubber case, so held to be an infringing device, was identical with the present Apco absorber now before this Court.** (Rec. 11, Paragraph 8, of Answer.)

Printed copies of Judge Westenhaver's opinion in this Forest City case were filed with the record that accompanied the Certiorari Petition herein, said opinion not having been published, and these copies are now available in connection with the present record.

And again by Judge Killits, in the District Court for the Northern District of Ohio, Western Division, April 10, 1916, in the case of this Petitioner v. The Halladay Company, et al. In both of these Forest City and Halladay cases the defendants made and paid cash settlements.

Sixth. Various other companies which had sold these same Apco shock absorbers, when sued by Petitioner for infringement of this same patent, **acquiesced** in the charge of infringement and in the validity of this Thompson patent, among such suits being these: one in the United States District Court for the Southern District of Ohio, Eastern Division, Judge Sater presiding, January 22, 1924—this Petitioner v. The

Cooper Rubber Co.; another in the United States District Court for the Western Division of Kentucky, Judge Moorman presiding, December, 1925—this Petitioner v. The Belknap Hardware Co.; and another in the United States District Court for the Eastern District of Tennessee, Northern Division, Judge Hicks presiding, in March, 1924, in this Petitioner v. The Tennessee Mill and Mine Supply Co. (Rec. 253, 206). The identical shock absorber of this Respondent was involved in each of these several actions just recited, and in each of which final decrees and permanent injunctions were duly entered by reason of settlements, or because of the discontinuance of the infringing acts of the respective defendants.

Seventh. Your Petitioner then later filed its bill of complaint against this Respondent, Apco Manufacturing Company, in the United States District Court for the Northern District of Georgia, Northern Division, for the infringement of said Thompson patent by the manufacture, use and sale of **these present Apco shock absorbers, which are the same absorbers as were involved in the District Courts as recited above**; and **which Apco absorbers are identical in all of their infringing particulars with The K-W Ignition Company shock absorber held to be an infringement by the Court of Appeals of the Sixth Circuit** as above stated; and are also substantially the same shock absorbers structurally and in their mode of operation as those held to be infringements by Judges Westenhaver and Killits in the Forest City and Halladay suits, as recited above.

Eighth. On the 31st day of October, 1924, the District Court for the Northern District of Georgia sustained the validity of this patent as to claims 1, 2 and 4, and found that they were infringed by this Apco absorber, following thus far the decision of the Court of Appeals for the Sixth Circuit in 243 Fed. 588 supra;

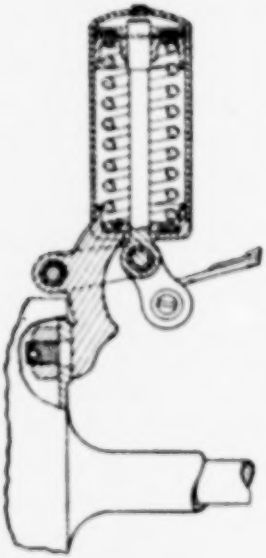
but departed from the judgment of that Court of Appeals as to claim 3, and held it to be void, on a question affecting the form or recitals of the claim.

Ninth. That said cause later came on to be heard, January 27, 1920, in the Court of Appeals for the Fifth Circuit, where was rendered the judgment now to be reviewed, holding the Thompson patent to be invalid as to Claim 3, because of said alleged defect in its mere **form or recitals**; holding Claims 1, 2 and 4 of the patent were limited to their narrowest details; and holding in consequence that these Claims 1, 2 and 4 were not infringed by this same Apco shock absorber (Rec. 275, folio 381), though admitting the validity of these claims. But this same Apco shock absorber, Judge Westenhaver held, in the Penn. Rubber & Supply Co. case, was an infringement, and as to which question of infringement the numerous defendants acquiesced in in the cases recited supra in this brief, while the absorber before the Sixth Circuit Court of Appeals in Petitioner v. K. W. Co., supra, **is in all functional features and its mode of operation the same also as Respondent's absorber involved herein.** See the illustrations on page 6.

Before Sixth Circuit

FIG. 3

K.W. IGNITION CO., TYPE FOUND INFRINGEMENT WITH OR WITHOUT CASING 243 FED. 590



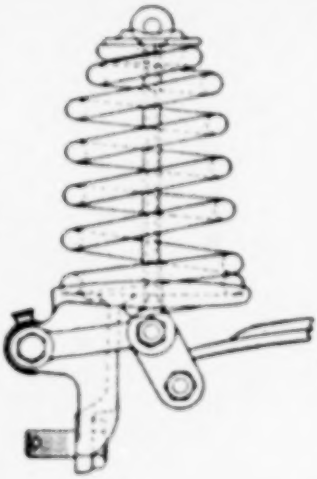
FROM K.W IGNITION CO, CASE MAIN RECORD P 181

K-W Infringing Absorber (From Plaintiff's Exhibit 6) Petitioner v. K-W Ignition Co., 243 F. 588

Before Fifth Circuit

FIG. 7

APCO PRESENT TYPE. ADDED RADIUS LINK LIKE K. W. AND REMOVED COVER C.C. A. 6TH CIR., HOLDS DOES NOT AVOID INFRINGEMENT.



APCO CASE.

Apco Absorber (From Plaintiff's Exhibit 6) Petitioner v. Apco Mfg. Co.

So much for the statement of the nature and character of this case.

What the Sixth Circuit Judges Held Regarding This Patent.

The Court of Appeals for the Sixth Circuit in the case of Petitioner v. K-W Ignition Co. (243 Fed. 588) held all of the claims of this patent were valid and infringed.

The Court of Appeals for the Fifth Circuit held that Claim 3 is invalid because of an alleged defect in its form, saying that the claim is "vague as can be" and "incomplete," contrary to said finding of validity of all the claims by the Court of Appeals of the Sixth Circuit, and by Judge Clarke, affirmed in 243 Fed. 588; by Judge Westenhaver, in Petitioner v. Forest City Electric Co., and by Judge Killits in Petitioner v. Halladay Co.—no opinion, but decree printed at page 310 of this record.

In this K-W case, Mr. Justice Clarke (when District Judge) said of the patent and its claims that:

> "Assuming the fact to be, as the evidence quite clearly shows is the fact, that the plaintiff's device does really contribute to the comfort of riding in motor cars, to which it was applied, especially in Ford cars, we have in addition in this case the consideration that the device when put upon the market met with such immediate and great sales that they cannot be justly attributed to unusual advertising or other creating of the market. The sales agent for the defendant testifies that he was at Vancouver, Canada, when he was notified of the execution of the contract of April, 1913, between the plaintiff and the defendant company, and he says that on his way home he sold between 300 and 400 sets of the road smoothers or shock absorbers before he had seen the article or knew the prices, and without the use of any literature or advertising. There were sold during the year of the life of the contract between 12,000 and 13,000 sets of shock absorbers, * * *"

(R. 390; p. 347, C. C. A. Rec. Appellee's Exhibit 14.)

"And while the construction of the patent in suit is made up of well-known elements, yet they are combined in a manner so different from any combination that preceded it, that the immediate adoption of it by the general public is very persuasive evidence that it possesses that novelty and merit which lifts it to the level of invention."

(R. 390-1; p. 347, C. C. A. Rec. Appellee's Exhibit 14.)

In this K-W Ignition Co. case (243 Fed. 588), the Court of Appeals for the Sixth Circuit said of the invention and of the claims of the patent:

"The object of the patentee was to provide a shock absorber which would make riding in a Ford automobile easy. He accomplished this by supplying a set of quick-acting coil-springs in connection with a set of slow-acting and friction-retarded leaf-springs originally built into the vehicle. The compression and recoil of the two sets of springs occur at different times, in consequence of which their respective pulsations are not synchronous. The result of this is that the vibrations which would otherwise be transmitted to the frame of the vehicle are absorbed within the springs. The availability of the device for use is such that the owner of a Ford automobile, without the services of a mechanic, and without disturbing the operation or construction of his car, may, with slight instruction, remove the usual hanger which supports each end of each leaf-spring and insert the plaintiff's attachment in its stead. * * *"

"The effect of the arrangement is such that the recoil of the torsion spring begins before the full effect of the shock on the wheels can be transmitted through the leaf-spring to the body of the car and its occupants. Riding is thereby made easy." (243 Fed. 588, 589.)

The Court further said:

> "The merit and simplicity of the Thompson device were immediately recognized, and it promptly went into extensive use. Salesmen, before seeing it, and without the use of any advertising matter, found many ready buyers. The demands of the trade exceeded the ability to supply it."
>
> "The shock from the wheels passes through the leaf-spring first. The coiled spring is not between the axle and the leaf-spring and no one suggests how, within the terms of the patent (prior patent), a construction is permissible or possible thus to place it. The result which he (a former patentee whose patent was relied on as a defense) obtains and his manner of obtaining it are not the same or substantially the same as those secured and employed by Thompson * * * The remoteness of the other alleged anticipatory patents is such that they need not be mentioned. * * *" (243 Fed. 588, 589.)

In the case of Temco v. Forest City Co., Judge Westenhaver said as to the validity of this patent:

> "The defenses are the usual ones of invalidity for lack of novelty and lack of invention and non-infringement. * * * Ignoring the specific prior use, the validity of plaintiff's patent is not now open to question. It was upheld by this Court, Judge (now Mr. Justice) Clarke delivering the opinion, and his decision was affirmed on appeal. * * * An examination of the record in that case (the K-W case) discloses that all the patents pleaded and relied on herein as anticipation were all introduced in evidence. Six new patents only not set up in the answer as a defense or anticipation have been introduced on this hearing. They are available only as showing the state of prior art. Of these the one most relied on is No. 761,353 to J. A. Brill and W. S. Adams. This patent is for a suspension spring on a car truck and is clearly more remote in the art than others pre-

sented and relied on as an anticipation and held insufficient as a defense by the Circuit Court of Appeals. * * * Furthermore the validity of this patent was sustained by Hon. John M. Killits in a suit brought by the present plaintiff against the L. P. Halladay Company in the Western Division of this District. Upon this state of facts the validity of plaintiff's patent must be taken as conclusively established."

Claim 3 of the Patent and the C. C. A. of the Fifth Circuit.

This Court held Claim 3 was invalid, because "vague" and "incomplete," following in this respect the District Court in Georgia. The District Court in its opinion said:

> "For want of any statement as to how the leaf spring and helical spring are to be connected to and guided by the stanchions we think Claim 3 is incomplete and void." (Rec. top page 257.)

The Circuit Court of Appeals of the Fifth Circuit said of this claim:

> "Appellee (this petitioner) has filed a cross-appeal and insists that the claim which the District Court disallowed is valid. That claim is about as vague as it could be made. As pointed out by the District Judge, it fails to specify the means by which the leaf and helical springs can be connected to and guided by the stanchions. To sustain a claim as general as this is would be to allow a patent for a 'result and not for the mechanism producing it'." (Rec. 382.)

The claim here in question, and thus technically criticized and destroyed, reads as follows:

> "3. In automobile construction, wherein coiled springs are used auxiliary to leaf springs for absorbing shock to the road wheels, the combination of upright stanchions with the axle of the ground wheels, said stanchions being attached to the outer ends of said axle, leaf springs extending above the axle and between the stanchions, and support-

> ing the chassis frame, the said stanchions being adapted to limit the end motion of the leaf springs and thereby prevent side sway of the chassis frame, hangers for the outer ends of said leaf springs, said hangers having a vertical movement and being guided therein by said stanchions, and coiled springs interposed between said leaf spring hangers and said axle of the ground wheels."

Involving the subject-matter found in Claim 3, and its consequent validity, and the feature of limiting the side sway, the Court of Appeals for the Sixth Circuit said:

> "The stanchion supports the torsion spring, limits the side movements of the leaf spring, and is provided at its upper end with a nut or stop which restricts the upward movement of the casing."

Here it will be observed that the last-named Court found that the "stanchion supports the torsion spring" and "limits the side movements of the leaf spring." Turning to Claim 3 quoted above, it will be seen that it specifies the elements by which these two functions are carried into effect. It calls for the "upright stanchions," the "leaf springs extending above the axle and between the stanchions," the "said stanchions being adapted to limit the end motion of the leaf springs and thereby prevent side sway of the chassis frame," and "hangers for the outer ends of said leaf springs, said hangers having vertical movement and being guided therein by said stanchions"; and then adds to the combination "coiled springs interposed between said leaf spring hangers and said axle."

Respecting this same matter as to limiting the side sway, Judge Westenhaver in Petitioner v. Forest City, said:

> "Defendant's device not only receives and absorbs the shocks in the same order, but limits and controls the side sway of the vehicle. This limita-

> tion and control of movement is obtained in plaintiff's patent by means of a shackle link and in its commercial form with the addition of a radius link, and the vertical movements of the hanger accommodate the extension and contraction of the automobile springs."

Manifestly, therefore, the technical objection of the Courts in the Fifth Circuit that this claim does not specify the means by which the "leaf and helical springs" could be connected to and guided by the stanchions, is incorrect and untenable. The claim distinctly says that the leaf springs extend between the stanchions; that the hangers are "for the outer ends of the leaf springs"; and that "these hangers have vertical movement" and are "guided therein by the stanchions"; the coiled springs being then added and stated to be "between" the hangers and the axle.

We perceive no incompleteness in the claim, as stated by the District Court in the Fifth Circuit; and no vagueness in the claim as observed by the Court of Appeals for that Circuit, who declared the claim to be "about as vague as it could be made." (Rec. 276, near bottom of page.) We find none of these infirmities in the claim; and neither did Mr. Justice Clarke when District Judge; nor Judges Warrington, Knappen, Denison, Donahue and Sater, when they decided the patent questions and the accounting and awarded this Petitioner the judgment for $292,938.26; nor did Judges Killits and Westenhaver when they sustained the patent—Judge Westenhaver twice, once against the Penn. Rubber & Supply Co., and once against The Forest City Company, in which latter case he wrote an elaborate opinion.

If this claim has such legal disability, incompleteness or vagueness as would justify reversing the judgment of the Patent Office in allowing it, and would support a decree of invalidity, certainly such defects

could not have escaped the astuteness of these numerous learned and experienced Judges in patent causes, in litigation where the patent was as hotly contested as the amount of recovery in the K-W case indicates it must have been.

It was a singular venture for the District Judge in Atlanta to write this declaration against the validity of Claim 3 in an opinion first rendered merely on a motion for a preliminary injunction—then later adopted when he decided the case on its merits. It was also an unusual disregard of the rule of comity and the doctrine of stare decisis for the Court of Appeals of the Fifth Circuit to refuse to follow the determinations concerning the validity of this patent as a whole by the very numerous Judges in the Sixth Circuit—not on any new evidence or new condition, but only on a forced and unnatural interpretation of all the claims, and of Claim 3 in particular.

We, therefore, submit that the rulings of both of these Courts of the Fifth Circuit as to Claim 3 are a singular instance of where an alleged defect in the mere form of a claim has been permitted unmeritoriously to prevail over the more wholesome course of the very numerous Judges in the Sixth Circuit in recognizing substance instead of pursuing the phantom of form. And that, after all, Claim 3 is, in fact, not what these Courts of the Fifth Circuit said it was, because the claim actually recites what they said it did not contain, namely, "the said stanchions being adapted to limit the end motion of the leaf springs and thereby prevent the side sway of the chassis frame."

And likewise we complain of the action of the Fifth C. C. A. in imposing this narrow scope upon Claims 1, 2 and 4, to the defeat in that Circuit of the rights of property embodied in these claims as upheld and maintained by Mr. Justice Clarke, Judge Warrington,

Judge Knappen, Judge Sater, Judge Denison, Judge Donahue, Judge Westenhaver and Judge Killits.

The Thompson Patent, No. 1,072,791, September 13, 1913.

This patent is based upon a novel and valuable invention in shock absorbers of wide-spread public adoption by vast numbers of Ford automobile users.

As will be seen by reference to the patent itself, a mechanical embodiment of this invention comprises a stanchion or guide D, mounted directly on the front axle of a Ford automobile, as in Figs. 1, 2 and 3 of the patent drawings; or on the brake flange J of the rear axle, as shown in Fig. 4; and a hanger or part C which is supported by the coil-spring G, and in turn supports the leaf-spring A of the machine through the intermediary of a link or shackle B.

As all shocks and "bumps" originate in the wheels by their heavy and rapid contact with the roadway, they are quickly and positively transmitted to the axle and the stanchions D, which are mounted thereon. From the stanchions the shocks enter the lower end of the coil-springs. But before they can reach the hangers C, which rest upon the upper ends of these coil-springs, these springs wholly or largely absorb or "iron out" these shocks by their rapid vibrations or quick compressions and expansions. In the case of "light" shocks, these coil springs so fully absorb the disturbance that it never reaches the occupants in the machine. But in that of "heavy" shocks, the disturbance is partly absorbed by the coil-springs and the unabsorbed remainder passes on through the hanger (C) and into the leaf-spring by which, due to its long, sweeping vibrations, the disturbance is either wholly "ironed out" and lost, or reaches the car-body in such a subdued and enfeebled state as not seriously to disturb the occupants. As the patentees advise the public in their specifications:

"A further object is to separate the spring element into sets of members, each set acting in series, but in which a difference exists between the members of each set in the time of compression and recoil, for the purpose of causing the spring movement to have the nature of a series of pulsations, out of synchronism with each other, and therefore causing to be absorbed within the spring element itself, vibrations that would otherwise be transmitted to the car frame. We accomplish this by the use of the slow acting friction-retarded leaf-spring of common construction, and combining in action with it, the quick-acting coiled spring, together with devices which render the mechanism efficient and durable. * * *

"The action which takes place in our spring suspension when the vehicle is in motion is as follows: Shocks to the road wheel is absorbed more rapidly by the quick acting coiled spring than by the slow-acting friction restrained leaf-spring. The result is that shock to the road wheel is first absorbed by the coiled spring, and therefrom is transmitted to the body of the car and the occupants through the slow acting leaf-spring. As the compression and recoil of the leaf-spring is not synchronous with that of the coiled spring, the recoil of the coiled spring begins to take place before the full effect of shock to the road wheel can be transmitted through the leaf spring to the body of the car. This seesawing action, as it were, between the quick-acting coiled spring and the slow-acting leaf-spring causes a large portion of the effect from vibration to be nullified by the action of one and reaction of the other of these springs taking place simultaneously, thus absorbing within the spring element the sharper vibrations, thereby making the car more easy riding."

We insert (opposite page 30) a series of illustrations, a reproduction of Petitioner's Exhibit 6, Rec. 284, showing the various absorbers to which, respectively, the Courts were referring in the following quo-

tations. These illustrations include also Respondent's absorber, at the extreme right.

Mr. Justice Clarke on the Thompson Patent.

Mr. Justice Clarke (then District Judge) in the case of this Petitioner against The K-W Ignition Company, said in his opinion that:

> "Assuming the fact to be, as the evidence quite clearly shows is the fact, that the plaintiff's device does really contribute to the comfort of riding in motor cars, to which it was applied, especially in Ford cars, we have in addition in this case the consideration that the device when put upon the market met with such immediate and great sales that they cannot be justly attributed to unusual advertising or other creating of the market. The sales agent for the defendant testifies that he was at Vancouver, Canada, when he was notified of the execution of the contract of April, 1913, between the plaintiff and the defendant company, and he says that on his way home he sold between 300 and 400 sets of the road smoothers or shock absorbers before he had seen the article or knew the prices, and without the use of any literature or advertising. There were sold during the year of the life of the contract between 12,000 and 13,000 sets of the shock absorbers. * * *" (Rec. bottom 282.)

Speaking of the mode of operation of this Thompson shock absorber, embraced in the patent in suit, Mr. Justice Clarke further said:

> "The theory upon which the plaintiff claims that the construction described in its patent is useful and novel is that since a coil-spring acts more quickly than a leaf-spring, and since in the patent in suit the coil-spring is interposed directly between the axle of the car and the leaf-spring, the shock to the wheel on the road will be absorbed more rapidly by the quick-acting coil-spring than by the slow-acting friction restrained leaf-spring with the result that the compression and recoil

of the leaf-spring is not synchronous with that of the coil-spring, and that therefore the full effect of the shock to the wheel will not be transmitted to the body of the vehicle or to the persons riding in it. That this is not a fanciful theory seems to be established by the evidence, and that the defendants are not in a position to in good faith dispute it is abundantly proved by the manner in which they advertised the construction of the patent and held it out to the public as contributing to the comfort of the riders, especially in Ford cars, and as contributing also to reduced wear of tires. Up to the time of trial the defendant continued to make the same claims for the shock absorber which it has manufactured and sold since the contract with the plaintiff was terminated." Ibid* (Rec. 281-2.)

Court of Appeals for the Sixth Circuit on the Thompson Patent.

In affirming Mr. Justice Clarke, the Court of Appeals for the Sixth Circuit, Judges Warrington, Knappen and Sater, the latter writing the opinion, said:

"The object of the patentee was to provide a shock absorber which would make riding in a Ford automobile easy. He accomplished this by supplying a set of quick acting coil-springs in connection with a set of slow acting and friction retarded leaf-springs originally built into the vehicle. The compression and recoil of the two sets of springs occur at different times, in consequence of which their respective pulsations are not synchronous. The result of this is that the vibrations which would otherwise be transmitted to the frame of the vehicle are absorbed within the springs. The availability of the device for use is such that the owner of a Ford automobile, without the services of a mechanic, and without disturbing the operation or construction of his car, may, with

*(That defendant first bought the absorbers from this Petitioner and resold them, but later both made and sold the infringing absorber which in all essentials was like the present Respondent's absorber.)

slight instruction, remove the usual hanger which supports each end of each leaf-spring and insert the plaintiff's attachment in its stead. * * *"

"The effect of the arrangement is such that the recoil of the torsion spring begins before the full effect of the shock on the wheels can be transmitted through the leaf spring to the body of the car and its occupants. Riding is thereby made easy." (243 Fed. 588,589.)

The Court further said:

"The merit and simplicity of the Thompson device were immediately recognized, and it promptly went into extensive use. Salesmen, before seeing it and without the use of any advertising matter, found many ready buyers. The demands of the trade exceeded the ability to supply it." Ibid.

Temco v. Pennsylvania Rubber Co., by Judge Westenhaver.

This Petitioner sued the Pennsylvania Rubber Company, doing business in Toledo and Cleveland, Ohio. It distributed **the Apco shock absorber here in question for the Apco Manufacturing Company,** the Respondent herein. The Apco Company, this Respondent, was joined as a party defendant on the theory that the Pennsylvania Rubber Company was in effect a branch house of the Apco Company, doing business in Ohio. Later when this turned out not to be the exact fact, the bill was dismissed as against the Apco Company for want of jurisdiction, but retained against the Pennsylvania Rubber Company.

It was tried on December 3, 1923, before Judge Westenhaver, sitting in Toledo. It was necessary to make a prima facie case because an answer had been filed denying the equity of the bill. Groton v. Clark, 136 Fed. 27 (C. C. A. 8th Circuit); also Rogers v. Menhall, 13 Fed. 59 (C. C.); Klink v. Chicago, 219 Fed. 457 (C. C. A. 8th Circuit).

A transcript of the trial in that case has been filed as

an exhibit in this present case. (Petitioner's Exhibit No. 30.) Mr. Keller, counsel for Respondent in this present case, and former U. S. Judge Day of Cleveland, were counsel of record in this Pennsylvania Rubber case. They were notified of the trial but did not attend. When the trial opened Judge Westenhaver said:

> "Mr. Owen (a Toledo lawyer) reported to us that Mr. Keller advised him that he hadn't any intention of appearing to interpose a defense." (Last page of transcript.)

The Court at the conclusion of the presentation of the patent with proof of its infringement by Ex-Commissioner of Patents, Hon. James T. Newton, who acted as this Petitioner's expert, and who also exhibited **specimens of the Apco shock absorbers, identically such as are in the present case,** entered a decree substantially like that entered in the Forest City case, (Rec. 251) the necessary verbal changes being made.

So here was an adjudication that **this Apco absorber is an infringement of Petitioner's patent,** which we think ought to have had due weight with the Courts of the Fifth Circuit.

The I. J. Cooper Rubber Co. Case.

If the Court will refer to Rec. 253, it will find that a decree was entered against The I. J. Cooper Rubber Company of Columbus, Ohio, after suit by this Petitioner on this Thompson patent had been brought. The defendant settled by paying an agreed sum for the **infringement committed by selling these same Apco shock absorbers which it had purchased from this Respondent.**

Tennessee Mill & Mine Supply Co. Case.

This company on being sued by this Petitioner as an infringer of the Thompson patent by reason of selling **these Apco shock absorbers,** purchased from the pres-

ent Respondent, consented to a decree and made a settlement by paying an agreed sum.

The Belknap Hardware Co.

By referring to the injunction in this Belknap case, (Rec. 206), the Court will further see that this Petitioner sued the above-named company for infringing the Thompson patent by selling these Apco shock absorbers in Louisville, Kentucky, after purchasing such absorbers from the Respondent in the present case. A preliminary injunction was issued by the Court and the Belknap Company gave up further infringement.

All these are matters of weight, in which business men have acquiesced in the controlling position in this art of the Thompson patent, in addition to the judgments of the Courts. And all of this, which arose in the numerous Courts of the Sixth Circuit, the Courts of the Fifth Circuit gave practically no heed to.

Validity and Infringement Questions Were Stare Decisis When Petitioner Entered the Fifth Circuit.

The prevailing rule of law, which we, of course, realize we need not so much as mention in this Court, and which we merely refer to by way of presenting a position of strength of which the Courts in the Fifth Circuit deprived Petitioner after its long and expensive struggle in the Sixth Circuit, is that in a later case on the same patent, a Court will follow, adopt and apply the decisions of the Courts made in earlier cases on the questions of the validity and scope of a patent, and will treat these questions as stare decisis, unless there is new and material evidence in the later case of such a character as would clearly have caused the Courts in the previous cases to have decided otherwise than they did.

And on the question of infringement the same rule also prevails and is universally applied where the earlier and later infringing devices are the same or substantially the same in arrangement of parts and mode of operation as were those involved in the earlier cases.

And the force of these rules and their binding effect

in the later case is increased when an earlier decision was by a Circuit Court of Appeals; in this instance by the very experienced Court of Appeals for the Sixth Circuit.

These rules are based on sound public and judicial policy—that of uniformity of decisions; and especially so amongst Federal Courts when determining rights of property based on the same Federal grant—Letters Patent of the United States—as in the case at bar. This rule is further supported by the American and English doctrine of precedents—a doctrine which probably largely distinguishes American and English jurisprudence from that generally prevailing in other countries, and which doctrine long ago appeared even in English literature.

> "Set it down thyself, as well to create good precedents as to follow them."
>
> Bacon, Great Place.

> "He hath lately found out, among the old Records of the Tower some Precedents for raising a Tax called Ship-Money."
>
> Howell, Letters, I. vi. 11.

> "My Lord Melun, let this be copied out, and keep it safe for our remembrance: return the Precedent to these Lords again."
>
> Shakespeare's King John v. 2, 3.

In Hobbs v. Beach, 180 U. S. 389, in which even this high Supreme Court gave heed to prior decisions of lower Courts concerning patent adjudications, this Court said:

> "Of course, we are bound to give to this question of anticipation an independent consideration. At the same time, we feel ourselves bound to defer somewhat to this unanimity of opinion upon the part of so many learned and distinguished judges, whose lives have been so largely devoted to the examination of patent causes."

Some of the cases which lay down these rules and in which they have been applied, are the following:

Gormley & Jeffery Tire Company v. United States Agency, 177 Fed. 692.

Beach v. Hobbs, 92 Fed. 147.

Cincinnati Butchers' Supply Co. v. Walker, 230 Fed. 433-4.

Concrete Appliances v. Gomery, 284 Fed. 518.

Adt v. Kerstein, 259 Fed. 277.

Jay v. Sparks-Withington, 258 Fed. 45.

Meurer Steel Barrel Co. v. Draper Mnfg. Co., 260 Fed. 410.

Flat Slabs Patents Co. v. Wright, 283 Fed. 345.

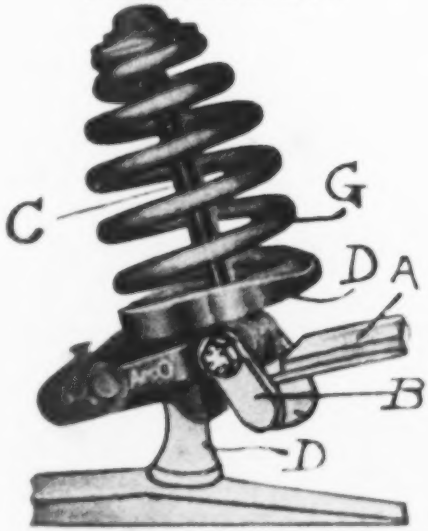
Vacuum Cleaner v. Thompson, 258 Fed. 239.

And it must be remembered that the Apco absorber and the K-W absorber are practically identical in elements or parts, in the relation of those parts, in their mode of operation, and in the result produced, so that the rule of stare decisis applies now as well to infringement as to the validity of the Thompson patent.

Respondent's Absorber.

This is generally spoken of in this Record as the "Apco" absorber. See the illustration of it given below:

Plaintiff's Exhibit 3.



This Exhibit 3 is also the same as Petitioner's Exhibit 4 in its suit against Respondent's customer in Pennsylvania and Ohio,—the Pennsylvania Rubber & Supply Company, in which Judge Westenhaver held this identical Apco absorber to be an infringement of this Thompson patent—to which suit reference is made more fully supra this brief.

It will be seen by reference to this illustration that Respondent's absorber, like the absorber of the Thompson patent, consists of a stanchion or guide D, D, mounted directly on the front axle of a Ford automobile, as in Figs. 1, 2 and 3 of the Thompson patent; a hanger C or part which is supported at its upper end by the coil-spring G, upon which the hanger and its cap rest, and which in turn supports the leaf spring A of the machine, through the intermediary of a connecting shackle B.

It is true that in the Apco absorber the stanchion D, D, and hanger C have been transposed in position, so that the stanchion is placed outside of the spring, and the hanger C is placed inside of the spring; but Petitioner has built its absorbers under this Thompson patent in both of these forms, and all of the numerous Judges who have sustained this patent have held that both forms are equally within the Thompson patent—the mere transposition of these parts not changing the mode of operation or result; and that the previous defendants who have all made their absorbers in this transposed form have been infringers. As said by the Court of Appeals for the Sixth Circuit:

> "**An outside cylindrical cover may be used or not, as the manufacturer chooses; but, if used, it serves no purpose other than to enclose the coil-spring.** The efficient casing or hanger which acts on the torsion spring is inside (in the K-W absorber and this Respondent) instead of outside of such spring and immediately surrounds the upper end of the upper part of the guide. * * The hanger's cup-like top (in the K-W absorber, as in Respondent) fits over the top of the coil spring, and, when a shock is received by the wheels, produces precisely

the same action on the spring as does the casing or hanger in the plaintiff's spring. The hangers in the two respective absorbers differ in form, but not in function. * * It would be idle to say that the plaintiff, keeping within the strict terms of its patent, could not put upon the market the same device that the defendants have been making." (243 Fed. 590, 591.)

Infringement.

We have seen by the quotations from the opinions of the learned Judges who have passed on this Thompson patent how they found it to be infringed by shock absorbers in all essentials as to structure and mode of operation like the absorber of this Respondent; while in the case of Petitioner v. Penn. Rubber Company, Judge Westenhaver held this very identical Apco absorber was an infringement of this patent.

See the illustration sheet inserted in this brief. Note the likeness of this Apco device, Fig. 7, to each of the others already adjudicated to be unlawful invasions of Petitioner's rights under this patent.

Former Commissioner of Patents Newton on Infringement.

Note also the finding of former Commissioner of Patents, Hon. James T. Newton, testifying as Petitioner's expert in this suit. He selected several of the claims and says that after examining Plaintiff's Exhibit 2, a specimen of Respondent's absorber, and Plaintiff's Exhibit 3, an illustration of it, he finds (Rec. pp. 148 et seq.):

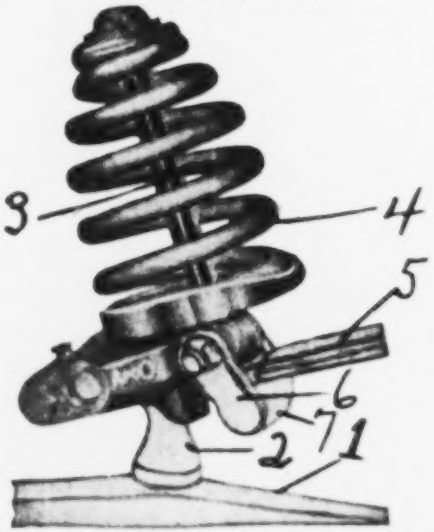
"That defendant's shock absorbers are substantially like the exemplifying structures shown in the patent in suit, the differences being in structural detail and not in matter of substance. I find that defendant's device is like plaintiff's patented structure in organization, mode of operation and result, and that defendant's Apco shock absorbers are identical in construction, mode of operation and result with the 'Apco' shock absorbers held by Judges Killits and Westenhaver to infringe the patent sued on herein in the suit of this plaintiff against the Penn

sylvania Rubber & Supply Co., in the Northern District of Ohio, Western Division. I further state that said Apco shock absorber held to infringe by Judges Killits and Westenhaver are identical in construction, mode of operation and result with the 'Apco' shock absorbers held to infringe the patent sued on herein in the suits of this plaintiff against the L. J. Cooper Rubber Co., in the United States District Court for the Southern District of Ohio, Western Division, and in this suit against the Belknap Hardware & Manufacturing Co., in the United States District Court for the Western District of Kentucky. Judge Sater granted the injunction in the Cooper case and Judge Moorman in the Belknap case.

"Said 'Apco' shock absorbers held to infringe by Judges Killits, Westenhaver, Sater and Moorman and the shock absorbers complained of herein are all correctly illustrated in Plaintiff's Exhibit No. 3.

"For convenience I shall apply several of the claims in suit to defendant's structure, using for that purpose the illustration of defendant's device shown in Plaintiff's Exhibit No. 3. This exhibit states that the shock absorbers are for Ford cars.

Plaintiff's Exhibit 3



"Claim 1 reads:

"'1. In automobile construction, the combination of a non-rotating axle for the ground wheels, of pins or slides attached to and upwardly projecting from said axle, sliding members for said upwardly projecting pins or slides, and a coiled spring interposed between the axle and the sliding member, leaf springs arranged transversely of the car and above the axle and attached at their middle portion to the chassis frame and linked at their outer ends to the sliding members.'

"Defendant's device fully responds to this claim. Its shock absorber is for use on a Ford car, which has a non-rotating axle for ground wheels. In Plaintiff's Exhibit No. 3, the numeral 1 in the left-hand cut, marked 'Front,' indicates the non-rotating axle for the ground wheels, 2 represents the pins or slides (stanchions) attached to and upwardly projecting from said axle, 3 indicates the sliding members (hangers) for said upwardly projecting pins or slides 2, and 4 is the coiled spring interposed between the axle 1 and the sliding member 3 (hanger), 5 indicates the leaf springs arranged transversely of the car and above the axle 1 and attached at their middle portion to the chassis frame and linked (by the links 6) at their outer ends 7 to the sliding members (hanger) 3. The springs of Ford cars are attached at the middle portion to the chassis frame. One of these shock absorbers is mounted near each end of the axle and the leaf springs are supported at their ends by these two absorbers. I find that the defendant's device fully responds to Claim 1, because the organization, mode of operation and result are alike.

"I also find that defendant's device responds to Claim 3 of the patent in suit. It reads:

"'3. In automobile construction, wherein coiled springs are used auxiliary to leaf springs for absorbing shock to the road wheels, the combination of upright stanchions with the axle of the ground wheels, said stanchions being attached to the outer ends of said axle, leaf springs extending above the axle and between the stanchions,

and supporting the chassis frame, the said stanchions being adapted to limit the end motion of the leaf springs and thereby prevent side sway of the chassis frame, hangers for the outer ends of said leaf springs, said hangers having vertical movement and being guided therein by said stanchions, and coiled springs interposed between said leaf spring hangers and said axle of the ground wheels.'

"I find that defendant's device also responds to this claim. Referring to Plaintiff's Exhibit No. 3, which illustrates defendant's device, we find 4 in the cut indicates the coiled spring. There is a shock absorber at each end of the axle and hence there are coiled springs and they are used auxiliary to leaf springs, indicated by the numeral 5, for absorbing shock to the road wheels. There are upright stanchions 2 in defendant's device on the axle 1 of the ground wheels, said stanchions being attached to the outer ends of said axle 1. Defendant's device also has leaf springs indicated at 5 extending above the axle 1 and between the stanchions 2. Only one stanchion is shown in the cut, but there is one at each end of the axle. These leaf springs 5 support the chassis frame, and the stanchions 2 are adapted to limit the end motion of the leaf springs 5 and thereby prevent side sway of the chassis frame. I also find in defendant's construction hangers 3 for the outer ends 7 of the leaf springs 5, said hangers having a vertical movement and being guided therein by said stanchions 2, and I find coiled springs 4, there being one at each end of the axle, interposed between said leaf spring hangers 3 and said axle 1 of the ground wheels.

"It will thus be seen that defendant's device is like the structure defined by Claim 3 in organization, mode of operation and result, and that it responds to this claim."

INFRINGEMENT

"I file herewith, and mark Plaintiff's Exhibit No. 5, a photostatic print of Plaintiff's Exhibits Nos. 3 and 4. This Exhibit No. 5 is identical with Plaintiff's Exhibit No. 7, on the injunction motion, in the suit of this plaintiff against the Pennsylvania Rubber & Supply Co., in which Judges Killits and Westenhaver held the patent sued on herein to be infringed by the 'Apco' shock absorbers, which shock absorbers are identical in construction, mode of operation and result with 'Apco' shock absorbers of the defendant herein."

Referring to the similarity of the K-W absorbers, found to infringe the Thompson patent by the Sixth Circuit Court of Appeals (243 Fed. 590), Mr. Newton correctly testified thus:

"Defendant's said 'Apco' shock absorbers are shown in Plaintiff's Exhibit No. 3 and The K-W Ignition Co. absorber is shown in Plaintiff's Exhibit No. 4. This K-W absorber was held to infringe plaintiff's patent in suit by the Court of Appeals for the Sixth Circuit in the suit of this plaintiff against the K-W Ignition Co. Lines have been drawn from defendant's shock absorber to the corresponding parts of the K-W absorber. These absorbers are the same in construction, mode of operation and result. Reference numerals corresponding to those applied to the left-hand cut in Plaintiff's Exhibit No. 3 have also been applied to this cut of the K-W device in Plaintiff's Exhibit No. 5.

"It will be seen from Plaintiff's Exhibit No. 5 that in both defendant's device and the K-W infringing device there are the upright stanchions *2* on the axle 1 of the ground wheels, said stanchions being attached to the outer ends of said axle 1. Both absorbers also have the leaf springs 5 extending above the axle 1 and between the stanchions *2*. In Plaintiff's Exhibit No. 3 and Plaintiff's Exhibit No. 4, as also in Plaintiff's Ex-

hibit No. 5, only one end of the axle is shown, but in practice an absorber is used at each end of the axle. These leaf springs support the chassis frame, and the stanchions 2 are adapted to limit the end motion of these leaf springs and thereby prevent side sway of the chassis frame. In both structures there were also present the hangers 3 for the outer ends 7 of the leaf springs 5, said hangers having a vertical movement and being guided therein by said stanchions 2. Coiled springs 4, one at each end of the axle, are interposed between the leaf spring hangers 3 and the axle 1 of the ground wheels.

"I have applied Claim 3 of the patent in suit to defendant's device and the K-W device for the purpose of illustrating that both of these devices are alike in organization, mode of operation and result, and that defendant's device responds to this Claim 3, as did the K-W device, which the Court of Appeals held infringed this claim.

"I file herewith, and mark Plaintiff's Exhibit No. 6, a true and correct print of Plaintiff's Exhibit No. 8 on final hearing in the suit of this plaintiff against the Pennsylvania Rubber & Supply Co., in the United States District Court for the Northern District of Ohio, Western Division. This Exhibit 6 correctly represents plaintiff's device and all of the devices that have been involved, and that have been held to infringe, in the various suits on the Thompson & Thompson patent No. 1,072,791, sued on herein. I have compared Plaintiff's Exhibit No. 6 with the devices heretofore held to infringe the patent sued on herein, and this Exhibit No. 6 correctly illustrates such infringing devices. Fig. 7 of this Exhibit No. 6 correctly illustrates the 'Apco' device involved in the suit against the Pennsylvania Rubber & Supply Co., and in the suits against the I. J. Cooper Rubber Co., and the Belknap Hardware and Manufacturing Co., and correctly represents the 'Apco' device of the defendant herein. Judges Killits, Westenhaver, Sater and Moorman, in the suits against the Pennsylvania Co., the Cooper Co., and the

Belknap Co., held the 'Apco' device shown in Fig. 7 to be an infringement of the patent sued on herein.

"Plaintiff's Exhibits Nos. 3, 4, 5 and 6 herein are identical with Plaintiff's Exhibits Nos. 3, 4, 5 and 6, respectively, in the Cooper and Belknap suits. Plaintiff's Exhibits Nos. 3, 4 and 5 herein are identical with Plaintiff's Exhibits Nos. 4, 6 and 7, respectively, on the injunction motion in the Pennsylvania suit, while Plaintiff's Exhibit No. 6 herein is identical with Plaintiff's Exhibit 8 on final hearing in the Pennsylvania suit heretofore referred to."

For a reply to the Dyer affidavit, pointing out errors in it, see Ex Commissioner Newton's lucid testimony, pages 153 to 159, of the Record.

Justice Clarke on Infringement.

In speaking of the defendant's device in the suit against the K-W Company, Mr. Justice Clarke on the question of infringement said:

"This shock absorber manufactured by the defendant has been introduced in evidence, and it seems very clear that in organization, mode of operation and result, it is in substance the same combination as that of the plaintiff's patent, and that it therefore infringes it." (See Fig. 3 of the folder inserted herein.)

The Court will note that this K-W absorber is in substance the same in arrangement and in parts, and resulting mode of operation, as the absorber of this Respondent. Both of these absorbers have been claimed by their makers to be made under the Stoltz patent—so claimed by the K-W Co. and this Respondent.

Sixth C. C. A. on Infringement.

Then referring to the K-W absorber and its infringement of Petitioner's patent, this Court of Appeals said it was "strikingly like that of plaintiff's".

adding that the K-W "hanger which acts on the torsion spring **is inside instead of outside of such spring,**" which is the fact also in this Respondent's absorber. Speaking of the K-W absorber, the Court said:

> "The hanger's cup-like top fits over the top of the coiled spring, and when a shock is received by the wheels, produces precisely the same action on the spring as does the casing or hanger in the plaintiff's spring. The hangers in the two respective absorbers differ in form, but not in function. The springs in a Ford automobile equipped with defendant's device receive shocks in the same order, operate in the same manner, and produce the same results as those in a Ford car on which the plaintiff's springs are used." * * *
>
> "It would be idle to say that the plaintiff, keeping within the strict terms of its patent, could not put upon the market the same device that the defendants have been making." * * *
>
> "The judgment of the trial court is affirmed. * * *" (P. 591.)

In the opinion of the Court of Appeals on the accounting, Judges Knappen, Denison and Donahue, 283 Fed. 873, 875, again said:

> "The device of plaintiff's patent is specially adapted for attachment to Ford automobiles. (So also with Respondent's absorber.) Its availability is such that the owner of a Ford car, without the services of a mechanic and without disturbing the operation or construction of the car, may, with slight instruction, remove the usual hanger which supports each end of each leaf spring and insert in its stead the plaintiff's attachment. * * *" (All of this applies equally to Respondent's absorber.)

Then referring to the construction of the K-W absorber, that Court said:

> "The hanger which acts on the coiled spring is thus inside instead of outside the coiled spring, (so also in Respondent's device), but produces the

same action thereon as does the casing or hanger of plaintiff's spring. Apart, at least, from the so-called 'dash pot' and the radius link later referred to, there is thus a mere reversal of parts. The hangers in the two absorbers differ in form, but not in function." (All this is true of Respondent's absorber also.)

Judge Westenhaver on Infringement.

Then referring to the Forest City absorber, illustrated in Fig 5 of the inserted exhibit sheet post, (which we ask this Court to turn to and observe in reading Judge Westenhaver's findings), Judge Westenhaver further said:

"I am of the opinion that defendant's construction is an infringement. This obviously was Judge Clarke's view when he granted the preliminary injunction and seems then to have been the view of defendant's counsel." * * *

"The close similarity of defendant's absorber to plaintiff's is apparent at a glance. It has a stanchion or support at one end adapted to fit in the hole in the axle or brake flange to support the torsion or spiral spring, and to limit the side movement of the leaf springs. (Likewise in Respondent's absorber.) It has also a hanger, having vertical movement and guided by the stanchion or support. (Again likewise in Respondent's device.) The leaf spring of the automobile when the bracket is mounted on the axle is connected with the hanger, and the torsion or spiral spring is supported in the stanchion above the axle, and is itself supported by the hanger. The shocks from the automobile wheels are first received by the torsionspring and are either wholly taken up by it or are modified and diminished before they reach the leaf spring, through which, if at all, they are communicated to the car body. (So also with Respondent's absorber.) Not only are the operating parts similar, but the mode of operation is similar. Both combinations depend on two kinds of springs, one the quick-acting tor-

sion spring, and the other, the slow-acting friction-restrained leaf spring. These springs vibrate out of synchronism. The order in which the shocks are received and absorbed, and the limitation or control upon the side sway or lateral movement of the vehicle are essential features of plaintiff's device, and are the ones to which its success is perhaps mainly attributable. Defendant's device not only receives and absorbs the shocks in the same order, but limits and controls the side sway of the vehicle. This limitation and control of movement is obtained in plaintiff's patent by means of a shackle link and in its commercial form with the addition of a radius link, and the vertical movements of the hanger accommodate the extension and contraction of the automobile springs. (All of this applies equally to this Respondent's absorber.) Defendant's device differs in that the aperture, through which the hanger operates, so as to accommodate but limit the extension and contraction of the leaf springs, is enlarged, permitting the hanger and casing to be tilted, and is supported by a ball bearing joint."

"Notwithstanding these changes, the same function is performed and the same result is realized thereby as by the shackle link. They may do so in a somewhat different manner, but the changes are colorable merely and do not produce a new and different combination, nor avoid infringement."

Such have been the unanimous opinions of the Judges and Courts in the Sixth Circuit, which for reasons of public policy ought to have been accepted by the Courts of the Fifth Circuit as to all of Thompson's claims.

Thus the weight of judicial opinion respecting the interpretation of the claims of the Thompson patent preserves the property rights this patent embodies, and makes the Government grant effective, as against the narrow and destructive restrictions placed upon the patent and its claims in the opinion of Judge Bryan

of the Court of Appeals for the Fifth Circuit.

That opinion, unhappily for the property rights of Petitioner, apparently does not have the vision of the actual invention made as an organization in which the heart and core of the conception exists in the co-ordination of the rapidly vibrating coil spring and the slow-moving leaf spring, with the former interposed between the axle and the leaf spring, and both combined with a stanchion or support for the coil spring, and a hanger between the coil spring and the leaf spring. But instead, that opinion, forgetting or overlooking this embodiment, wandered off to the form of Claim 3 and to the narrow idea that the invention was limited to guiding the hanger by a sliding contact with the stanchion. (Rec. 275, middle of third paragraph; Rec. 276, last paragraph.) Again, the opinion of Judge Bryan urges that the guiding of Respondent's hanger rod which is supported by the coil spring and has a connection at its lower end with the leaf spring by the radius link introduces, somehow, something "essentially different from the sliding hanger," to which he limits the patent. **Here that opinion as to his matter is in direct opposition to the weight of the judicial findings respecting this patent in which the Court of Appeals for the Sixth Circuit found that the K-W absorber was an infringement notwithstanding that that absorber had its hanger guided at its lower end by the radius link—the link that guides the lower end of the hanger to the stanchion.** The presence of the radius link in the K-W absorber did not influence the Sixth Circuit Court of Appeals from holding that absorber to be an infringement.

And when the accounting questions were before it, the Court also said:

> "Apart, at least, from the so-called 'dash pot' and radius link later referred to, there is thus a mere reversal of parts. The hangers in the two

absorbers differ in form, but not in function." (283 Fed. 873, 875.)

Certiorari.

The K. W. Ignition Company filed a certiorari petition in the Supreme Court of the United States praying for a review of the decision of the Court of Appeals for the Sixth Circuit with reference to the accounting. The Supreme Court denied the petition. (260 U. S. 746.)

Radius Link.

The radius link in the K. W. absorber, which is precisely like the radius link in the Apco absorber, both of which perform the same function, that of guiding the hanger which occupies a position within the coil spring, was urged in said petition as a reason for apportioning the profits made by the defendant, on the ground that some part of the profit should be attributed to the radius link. **But the radius link was and is without function by itself, and was and is only a substituted form of guide for the hanger of the absorber which had always had a guide under the Thompson patent.** The certiorari petition was denied, as stated above.

And the decision of the Court of Appeals for the Fifth Circuit in the case at bar was not only in conflict with the holdings of the Court of Appeals of the Sixth Circuit, but in conflict also with its own holding in Reed v. Hughes Tool Co., 261 Fed. 192. In that case the Fifth Circuit Court of Appeals held that an added feature in the nature of an improvement did not relieve the defendant from infringement. In the present case, it treated the added radius link in a contrary way by making the addition of it an avoidance of infringement.

In the Reed case, the Fifth Circuit Court of Appeals said:

"Coming to the question of infringement, we think that the Reed Drill (defendant's device) was substantially identical in structure and function with the drills of the patent in suit. * * * The Reed drill has an **improvement upon the drills disclosed by the patents in suit,** * * * It is conceded that this **constitutes an improvement upon the drills covered by both** the Griffin and the Hughes patents. It is also true that a patent has been issued to Reed to cover this improvement. The Reed bit, however, appropriates for the base of this improvement the invention of the patents in suit."

"The law is settled that an improver cannot appropriate the invention of his predecessor, who has obtained a patent, as a base for his improvement, without the consent of the patentee, and without infringement, even though the improvement has become the subject matter of a patent." (Page 194.)

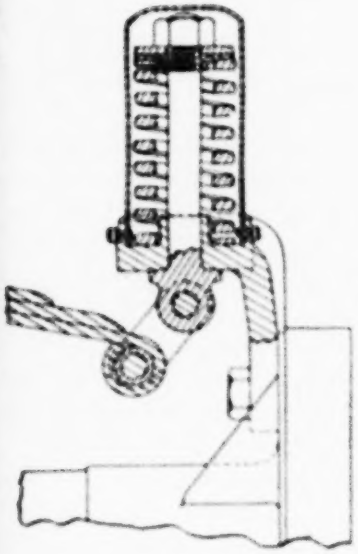
In conclusion, on the present infringement, we again submit that not only is Respondent's absorber a perfect embodiment of the Thompson invention, part by part—stanchion, coil spring on the stanchion, hanger supported by the coil spring, leaf spring connected to the hanger, with the coil spring first receiving the shocks from the axle, absorbing the minor shocks and reducing the major shocks before they reach the leaf spring, all in exactly the same manner as in the Respondent's absorber—but Respondent's absorber, radius link included, is like the other absorbers held to infringe, as seen in Figures 1, 2, 3 and 5 of the illustrated-sheet inserted opposite this page, all of which, except the Forest City absorber (Fig. 5 on said sheet), had the radius link.

Patentee Storrie's Admissions.

Mr. Storrie, patentee of the Storrie Patent No. 1,279,035, under which Respondent claims it is operating (a patent now owned by Mr. Keller, of counsel

FIG. 1

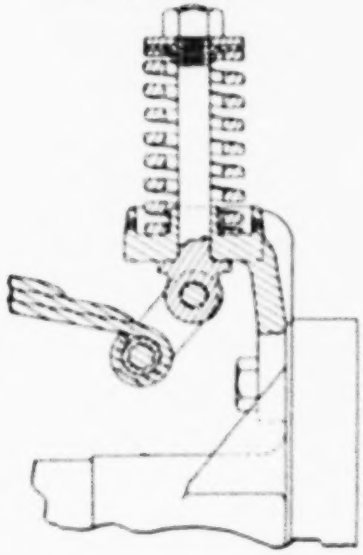
HALLADAY CONSTRUCTION-
HELD BY THIS COURT
AN INFRINGEMENT.



FROM HALLADAY
CABE.

FIG. 2

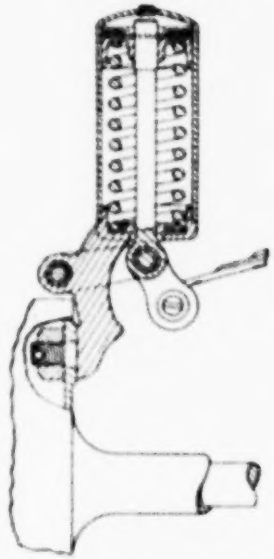
SAME AS FIG. 1 CASING
REMOVED C.C.A. 6TH
CIR. 243 FED. 590.
SAYS PRESENCE OF
CASING IMMATERIAL.



FROM HALLADAY
CASE

FIG. 3

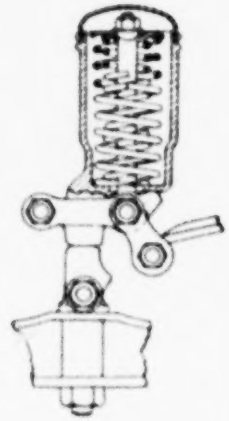
K.W. IGNITION CO.,
TYPE FOUND INFRIN-
GEMENT WITH OR WITHOUT
CASING 243 FED. 590



FROM K.W
IGNITION CO, CASE
MAIN RECORD P. 181

FIG. 4

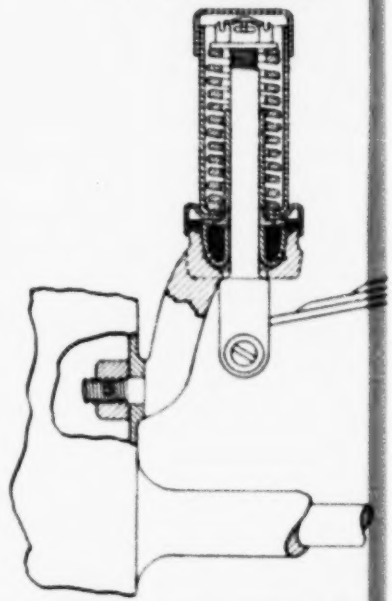
ONE OF TEMPCO, FORMS
WITHIN PATENT IN K.W.
CASE C.C.A. 243
FED. 588



FROM K.W.
IGNITION CO, CASE
MAIN RECORD P. 197

FIG. 5

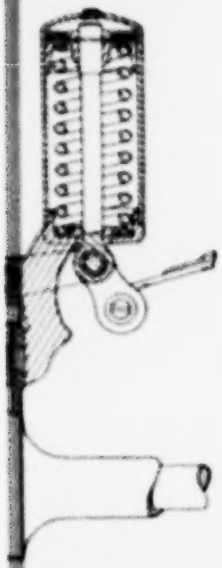
COMPLAINANT'S INFR-
INGEMENT ILLUSTRATION
DEFENDANT'S ATTACHMENT
FOREST CITY CO.



FROM FOREST CITY SUIT-
HELD INFRINGED.

FIG. 3

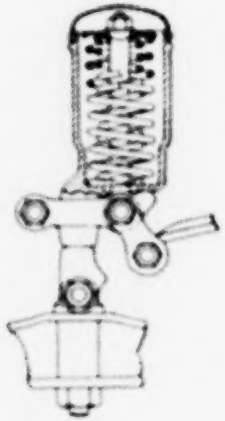
IGNITION CO.,
FOUND INFRIN-
ENT WITH OR WITHOUT
243 FED. 590



ROM K.W
ION CO, CASE
ECORD P 181

FIG. 4

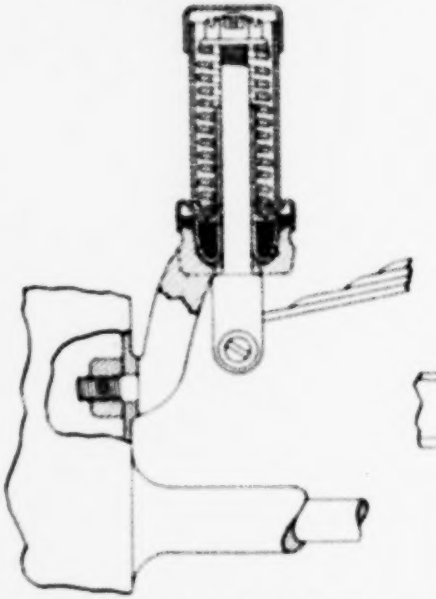
ONE OF TEMPCO, FORMS
WITHIN PATENT IN K.W.
CASE C.C.A. 243
FED. 588



FROM K.W.
IGNITION CO, CASE
MAIN RECORD P 197

FIG. 5

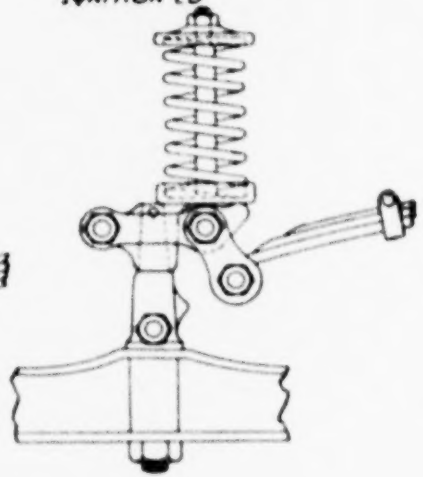
COMPLAINANT'S INFR-
INGEMENT ILLUSTRATION
DEFENDANT'S ATTACHMENT.
FOREST CITY CO.



FROM FOREST CITY SUIT-
HELD INFRINGED

FIG. 6

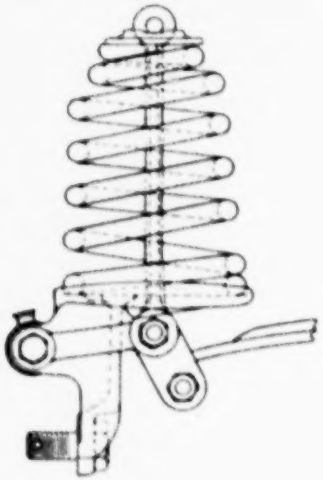
ORIGINAL THOMPSON
ABSORBER WITH LINK
AND WITHOUT CASING
COPIED BY K.W.
IGNITION CO.



FROM K.W IGNITION CO.
CASE MAIN RECORD P 199

FIG. 7

APCO PRESENT TYPE.
ADDED RADIUS LINK LIKE
K.W. AND REMOVED COVER
C.C.A. 6TH CIR., HOLDS
DOES NOT AVOID INFRINGENENT.



APCO CASE.

for Respondent Rec. 21), was a witness for Respondent. Among the things he admitted those appearing below bear on the question of infringement, because he conceded that the coil spring and the leaf spring in Respondent's absorber operate in the same coordinated manner as in the Thompson patent; and because he conceded that the radius link is a guide to the lower end of the hanger rod which is supported by the coil spring, and thus constituties a guide even of the modified form, or by way of an addition to the particular embodiment of the Thompson device illustrated in the patent.

In other words, in the patent, a stanchion in that form of embodiment, guides the hanger; while in the K-W absorber, in one form of Petitioner's absorber and in Respondent's absorber, the radius link was pivoted to the stanchion and to the hanger to form the immediate guide for the hanger, but even in such case the stanchion was the element from which the hanger was guided and which made it possible to use the radius link.

So in all of the forms of absorbers here referred to, the stanchion was the ultimate guiding element for the hanger, whether the link was interposed or not.

It is also true that the K-W Ignition Co., the defendant in the case before the Court of Appeals for the Sixth Circuit (283 Fed., 873, 870) held a license under this same Storrie patent under which it endeavored to justify itself. But that fact did not relieve the K-W absorber from the charge of infringement.

Recurring now to the admissions of Storrie, we quote the following from his testimony:

> "Should the radius links be done away with, the lower end of the depending link passing through the spring when deflected would have to have some controlling element to keep it in a vertical position, seeing that we have no guiding ele-

ments other than the spring itself. I refer to the coil spring, to maintain true position." (Rec. 62, near top.)

"In Exhibit 2 (defendant's) the spring and radius links retain the spring center line 5 [the hanger] in a vertical position when it moves down from the position shown." (Rec. 81, near bottom.)

"The radius links are pivotal on stanchion 2." (Rec. 62, near middle.)

"CQ. What was the relationship of the coil spring to the leaf spring in this combination?

"A. The relationship was such that shocks would be neutralized by the coil spring before they would go on to the leaf spring in this arrangement of parts." (Rec. 63.)

Respondent has pretended that the bee-hive form of its coil spring in some manner differentiated its absorber from the Thompson patent. But Storrie, on cross-examination, testified that the net results are the same whether a cylindrical coil spring or a bee-hive shaped coil spring be used. He was asked if there was any difference between these two forms of springs in the net result of the operation of the absorber, and answered:

"A. The net result of Defendant's Exhibit No. 1 (showing Storrie absorber with cylindrical form of coil spring) and Defendant's Exhibit No. 2 (showing Apco absorber with bee-hive form of coil spring) are the same." (Rec. 64.)

Again, on cross-examination, he was asked and answered:

"CQ. 297. But for practical purposes the net result to the car and the passenger during the operation of these two structures will be the same?

"A. If you wish to speak generally, I would say yes." (Rec. 77.)

These admissions of Storrie eliminated all pretended

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differences in the net results as between a cylindrical form of coil spring shown in the Thompson patent—**though the claims are not limited to any such form of such spring**—and the bee-hive form of coil spring, which are optional in the general combination. These admissions are enough, standing alone, to establish the mechanical equivalency of the Apco absorber and that of the Thompson patent as defined and applied by the Courts in the K-W case.

Craig's Testimony—Craig, a Mechanical Engineer Testifying as an Expert. (Rec. 24, et seq.)

In rebuttal by the Petitioner, the following facts were established by his testimony, which was based on actual spring tests made in his capacity as an engineer, without any interest in the controversy.

(1) That helical springs have the same action, and the same adherence to Hook's law, whether they are cylindrical or straight-sided coil springs or bee-hive shaped coil springs; and that a leaf spring is different in action from these torsion springs.

(2) That Craig's tests proved that the bee-hive spring had the same action of compression that the straight-sided coil spring has.

(3) That in Respondent's absorber, the radius link is a part of its stanchion and acts to guide the hanger just as Thompson uses his stanchion to guide the hanger, because in both cases the hangers are free elements resting at their tops on the coil springs and are guided at their lower ends by the stanchion, whether the guiding is effected by a link, such as a radius link, or by a sliding contact, such as shown in the Thompson patent representing one embodiment of the invention.

The Court will find the Craig testimony illuminating because it describes his experiments and sets forth how the photographs he produced picture the parts of

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the absorber under the conditions of the test.

He also testified that the model produced by Respondent was not a fair representation of Respondent's device because it did not correctly represent the actual construction of the Ford car; and that while you could move with your fingers the absorbers on the model laterally and pivotally, you could not so move them when they were hooked up at the exact dimension of the leaf spring found in the Ford car, where they were under the load of the body and engine.

Georgia District Court's Injunction Opinion.

In its opinion on the injunction motion, the Court said:

> "* * * But my opinion agrees with that apparently entertained in the Patent Office that it (the absorber with the Storrie radius link added) is at least no infringement of Thompson's patent which includes in place of it the sliding device." (Rec. 194.)

The statement here made that the Patent Office entertained an opinion that there was "no infringement of Thompson's patent," is founded on a wholly erroneous impression. The Patent Office does not decide questions of infringement.

All the Patent Office did in allowing the Storrie patent was to adjudge that the radius link was a specific structural addition to the Thompson patent which it cited in its official actions on the Storrie application, as showing all was old in the Storrie device save only the addition of the radius link, the patentability of which addition it was questioning. (See Storrie's file wrapper, Appellee's Exhibit No. 21.)

From all that has been submitted above, it is manifest that Respondent's absorber, like the K-W absorber before the Court of Appeals in the Sixth Circuit, is an infringement of all of the claims of the Thompson patent, because Respondent's absorber has

all of the elements of the Thompson invention, in the same relation, save only the addition of the radius link.

On this question of infringement by the Apco shock absorber, we quote the pertinent holdings of this high Court in Winans v. Denmead, 15 How. 330:

> "It is generally true, when a patentee describes a machine, and then claims it as described, that he is understood to intend to claim, and does by law actually cover, not only the precise forms he described, but all other forms which embody his invention; it being a familiar rule that, to copy the principle or mode of operation described, is an infringement, although such copy should be totally unlike the original in form or proportions."
>
> "Where form and substance are inseparable, it is enough to look at the form only. Where they are separable, where the whole substance of the invention may be copied in a different form, it is the duty of Courts and juries to look through the form for the substance of the invention—for that which entitled the inventor to his patent, and which the patent was designed to secure; where that is found, there is an infringement; and it is not a defense, that it is embodied in a form not described, and in terms claimed by the patentee."
>
> "And, therefore, the patentee, having described his invention and shown its principles, and claimed it in that form which most likely embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of those forms."

ustice Clarke on Prior Art.

As to the prior art or what existed prior to the Thompson patent, Mr. Justice Clarke further said:

> "The patents introduced in evidence make it clear enough that, for a considerable time before the date of the Thompson invention in suit, there was a very general effort among inventors to discover means of relieving the jolting occasioned by motor cars moving at high speed over rough

streets and roads, none of which served the purpose intended nearly so well as the patented device in suit, especially in the cars to which the latter are best applied. And while the construction of the patent in suit is made up of well-known elements, yet they are combined in a manner so different from any combination that preceded it, that the immediate adoption of it by the general public is very persuasive evidence that it possesses that novelty and merit which lift it to the level of invention." (Rec. 283.)

Court of Appeals on Prior Art.

Referring to the several prior art patents cited by the Respondent in that case, the Court of Appeals further said:

> "The shock from the wheels passes through the leaf-spring first. The coiled spring is not between the axle and the leaf-spring, and no one suggests how, within the terms of the patent (prior patent), a construction is permissible or possible thus to place it. The result which he (a former patentee whose patent was relied on as a defense) obtains and his manner of obtaining it are not the same or substantially the same as those secured and employed by Thompson. * * * The remoteness of the other alleged anticipatory patents is such that they need not be mentioned. * * *" 243 F. 588, 589

Judge Westenhaver on Prior Art.

Judge Westenhaver in Temco v. Forest City, in his opinion sustaining the validity and the charge of infringement of the Thompson patent said:

> "The defenses are the usual ones of invalidity for lack of novelty and lack of invention and non-infringement. * * * Ignoring the specific prior use, the validity of plaintiff's patent is not now open to question. It was upheld by this Court, Judge (now Mr. Justice) Clarke delivering the opinion, and his decision was affirmed on appeal. * * * An examination of the record

in that case (the K-W case) discloses that all the patents pleaded and relied on herein as anticipation were all introduced in evidence. Six new patents only not set up in the answer as a defense or anticipation have been introduced on this hearing. They are available only as showing the state of prior art. Of these the one most relied on is No. 761,353 to J. A. Brill and W. S. Adams. This patent is for a suspension spring on a car truck and is clearly more remote in the art than others presented and relied on as an anticipation and held insufficient as a defense by the Circuit Court of Appeals. * * * Furthermore the validity of this patent was sustained by Hon. John M. Killits in a suit brought by the present plaintiff against the L. P. Halladay Company in the Western Division of this District. Upon this state of facts the validity of plaintiff's patent must be taken as conclusively established."

So also as to the prior art set up in the present case in support of the defense of invalidity of the Thompson patent, this has been judicially determined to be art insufficient to defeat this patent.

The prior patents now set up are only three in number, namely, British patent to Bussing, No. 3,385; French patent to Peugeot, No. 418,997; and French patent to Cosset, No. 441,832.

In the K-W Ignition case, 50 patents were set up in defense against the validity of the Thompson patent; and in the Forest City case, 22 patents were so pleaded.

Bussing English Patent Now Cited Same as Bussing French Formerly Cited.

Among those 50 patents in the K-W case was **the French patent to the same Bussing, No. 374,364, showing identically the same device as shown in the British Bussing patent.** In legal effect, therefore, Mr. Justice Clarke and the Court of Appeals had before them this British Bussing patent and found it insufficient. That

it is, needs no argument. Both the Bussing English now cited, and the Bussing French then cited, being duplicates, show the leaf-spring mounted on the axle and the coil-spring connected to the chassis frame—the very arrangement which Thompson turned his back on and did not and could not follow in making the Thompson shock absorber. **Nor does Respondent make its Apco shock absorber like the Bussing patents.** Stare decisis again applies.

Peugeot French Patent.

The Peugeot patent, now cited, is not different in effect from the Lefevre patent, No. 430,135, and the Rimailho patent, No. 30,419, both cited in the K-W case. (Plaintiff's Exhibit 14, K-W Record, p. 12.) In Peugeot the leaf-spring is on the axle and the coil-spring is pressed upon by the chassis to support the chassis.

Lefevre Patent.

Likewise in the Lefevre patent the leaf-spring is on the axle and the coil-spring is pressed upon by the chassis to support the chassis; while in both, the coil-spring is suspended from the leaf-spring, and does not, and cannot, receive the shocks **first.**

Rimailho Patent.

Likewise in Rimailho, the leaf-spring is supported by the axle, and the coil-spring is pressed down by the chassis to support the chassis, while the coil-spring is suspended from the leaf-spring, and cannot **first** receive the shocks, as in Thompson's co-ordination of the springs.

So that the Peugeot patent presents nothing that was not before the Courts in the K-W case where the Lefevre and Rimailho patents were set up in defense.

Cosset French Patent.

In Cosset the leaf-spring is also to be carried by the axle, the coil-spring is pressed down by the chassis to

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support the chassis and the coil-spring is suspended from the leaf-spring just as in the Lefevre and Rimailho; another failure to get Thompson's co-ordination and result.

And besides, untried suggestions and mere picture proposals embodied in foreign patents without proof that they had ever come into actual use, do not carry conviction and are not to be used to defeat patents for inventions of great commercial utility and value, unless indeed they are perfect anticipations beyond question.

> Hanifen v. Godshalk, 84 Fed. 649 (C. C. A. 3).
> Selectasine v. Presto-O-Graph, 267 Fed. 840.
> General Electric v. Hoskins, 224 Fed. 464, 468 (C. C. A. 7).

There is nothing, therefore, of merit or anything anticipatory in these stale citations of the Bussing, Peugeot and Cosset patents.

Edwards Absorber.

Apparently Respondent has tried to make capital out of the fact that the Petitioner's subsidiary or licensee, Edwards Brothers Company, has lately promulgated an additional type of shock absorber. But the Court will find that this absorber merely contains an additional coil spring for preventing the rebound of the auto body when it recoils from a shock.

To accommodate this inner spring the base of the outer spring had to be enlarged in diameter—a matter of degree, not of principle. In this way the yoke which extends between the two springs was given sufficient space; and the yoke was permitted to be spread apart enough to receive the inner spring.

This is the Thompson absorber plus a snubbing spring. The addition of this snubbing spring does not at all in any manner whatsoever militate against the legal rights of this Petitioner. A mere added feature

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for a further function does not take anything away from the patentee's rights under his original patent.

Question of Estoppel of Respondent as Licensee Under K-W Ignition Co.

According to the deposition of Storrie, he executed a mortgage to the K-W Ignition Company covering his invention and the expected patent while Storrie's application was still pending in the Patent Office. The amount loaned Storrie by K-W was $2,000.00. Storrie failed to repay it and K-W took over the title and licensed Storrie to sell absorbers under the patent. Later Storrie obtained the consent of the K-W Company to transfer or extend his license to the Respondent. That was prior to the institution of this suit.

Now, Mr. Keller has taken the witness stand (Rec. 21) and testified herein that he has lately acquired the legal title to the Storrie patent from K-W, but subject to a reserved license K-W retained and subject to the old existing license in the Respondent, obtained from K-W through Storrie.

Thus there is established the relation of privity between the K-W Company and the Respondent with respect to the Storrie patent. The Respondent acquired its license from the K-W Company through Storrie as the channel. This succession or privity of rights under the Storrie patent puts this Respondent in respect to its attempted defense under the Storrie patent in the shoes formerly occupied by the K-W Company in its unsuccessful attempt to set up a defense by virtue of its ownership of this same patent. And this retention by the K-W Company of license rights under the Storrie patent, as testified herein by Mr. Keller on behalf of this Respondent, shows that the K-W Company still is endeavoring to profit in some manner under this patent, notwithstanding that the shock absorber which this Storrie patent discloses has long

since been adjudicated to be an infringement of Petitioner's Thompson patent, and as to which the K-W Company has long been under a final injunction; and has paid a final judgment of punitive damages and reasonable royalty amounting to $292,938.26. (283 Fed. 873.)

Again, as the K-W Company is under this final decree of infringement and injunction, this relation of privity established by the relation of licensor on the part of K-W and licensee on the part of this Respondent, would seem to create an estoppel, certainly an equitable estoppel, against the Respondent in respect to its denials that its Storrie absorber is an infringement of the Thompson patent.

Then we have Mr. Keller, formerly counsel for the K-W Company in this litigation under the Thompson patent, and now counsel in the like litigation against the Respondent, this licensee, of the K-W Company, going on the witness stand in the presence of the lower Court and testifying as stated above, that he had acquired from the K-W Company the Storrie patent, subject to the reserved license in the K-W Company and subject to the license from the K-W to this Respondent.

From all these circumstances three conclusions are manifest:

(a) That the relationship of privity exists between this Respondent and the defendant in the former litigation in the Sixth Circuit, which creates an equitable estoppel against indulging the present Respondent in relitigating in this Court the same questions that were formerly litigated by this Respondent's licensor respecting the validity of the Thompson patent and its infringement by the K-W absorber which mechanically is the full equivalent of this Storrie absorber. Mr. Storrie testified that whether the absorber is made with a bee-hive shaped coil spring or a cylindrical

coil spring, it is in either case within and covered by the Storrie patent. (See his testimony, p. 85 Rec.)

(b) That this resistance by this Respondent to the validity and infringement of the Thompson patent is not only in its own interest, but is also in furtherance of a service to the K-W Company for the license it gave without consideration, as Storrie testified, all in the hope that in this manner an adjudication may now be had contrary to the numerous adjudications in the Sixth Circuit, which might enure to the benefit of the Respondent's existing licensor, the K-W Company.

(c) That aside from this element of estoppel the wisdom and propriety of this Court following the decisions of the other Courts, and that in particular of the Court of Appeals in the Sixth Circuit, are manifest in order that there may be an end now to litigation over the same subject-matter and between the same parties or their privies. Certainly under these circumstances, having in view the hardships again being borne by this Petitioner, there should have been no hesitation on the part of the District Court and the Court of Appeals below in following the solemn final adjudications of like Courts in the adjoining circuit.

Summary Commercial Career Thompson Absorber.

In the testimony of Mr. Edwards, one of the original organizers and large owners of Petitioner, he states:

> "* * * They [these absorbers of Petitioner] have been continuously sold to the extent of two and one-half million dollars. For over a year these shock absorbers were manufactured and sold precisely like the drawings of the patent in suit, with a net profit of $100,000. That in order to make the absorbers more economical for production manufacture, the present embodiment was adopted, such as shown in the attached exhibits, 19 and 20. A sample of the K-W Ignition Company shock absorber, which was held to in-

fringe the present patent in suit, is marked Plaintiff's Exhibit 21, while a sample of the absorber as originally made during the first year—out of which $100,000 profit was made, is marked Plaintiff's Exhibit 22.

"During the first year of this manufacture of shock absorbers, out of the number of sets between 13,000 and 14,000, there were only about $700.00 worth of repairs, so that the shock absorbers were substantially perfect (record, page 136, Temco v. K-W Ignition, Plaintiff's Exhibit 14).

"We have never changed our design, save for adapting it to more ready commercial manufacture in large quantities, and the statement that we copied the Storrie design or any other is false." (Rec. 214.)

He further testified:

"That the K-W Company sold approximately 66,000 sets in all and the Temco Company 68,000 sets; that the 13,000 sets that were manufactured by the Temco Company and sold by the K-W Company are included in the 68,000 sets, so that the Temco Company has manufactured in all up to and including the year 1923 approximately 54,000 sets" (besides the 66,000 infringing sets made and sold by the K-W Company). (Rec. 239.)

In this connection the Court will be further informed on the commercial significance of this invention by reference to the decision of the Court of Appeals for the Sixth Circuit on the Accounting between this Petitioner and the K-W Company, in which $292,938.26 was awarded. (283 F. 873.)

Such an imposing recognition by the public of the novelty and utility of the invention as testified to by Mr. Edwards conclusively shows the benefit the patentees have conferred upon the public and affords cogent reasons for judicially awarding them and their assignees a decree which will protect their property rights.

The mere later issuance of the Storrie patent is evi-

dence only of a small patentable addition due to the specific added feature, and is not evidence of lack of infringement of the earlier patent, a rule broadly recognized and applied. Herman v. Youngstown, 191 Fed. 579, Court of Appeals for the Sixth Circuit; also Gordon v. Torco-Halvah, 247 Fed. 487, by the C. C. A. for the Second Circuit; also Simplex Window Company v. Hauser, 248 Fed. 919, by the C. C. A. for the Ninth Circuit.

In conclusion, it is submitted that as the judgment of the Circuit Court of Appeals for the Sixth Circuit in the K-W case has ripened by the lapse of ten years, 1917-1927, and as the conclusions of that Court as to the validity of Petitioner's patent and its infringement by the K-W shock absorber apply equally to the precisely same construction in elements, arrangement, mode of operation and result, found in Respondent's absorber, Petitioner should now be given the benefit of that adjudication as it applies to the present case.

This we urge with great respect and with a profound sense of Petitioner's mature adjudicated rights, which, as a matter of public policy and in the interest of uniformity of decisions, ought, under the circumstances set forth above, to be made effective and available now for the protection of Respondent's rights.

Respectively submitted,

H. A. TOULMIN,
H. A. TOULMIN, Jr.,
Counsel for Petitioner.

Dayton, Ohio,
1927.

J. J. SPALDING,
H. MacDOUGALD,
J. A. SIBLEY,
Of Counsel for Petitioner.

Atlanta, Ga.,
1927.